IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AAMCO TRANSMISSIONS, INC. Plaintiff, v. GARY OTTO, SUNWEST HOLDINGS, LLC and SUNWEST AUTOMOTIVE, LLC Defendants.	: : : : : :	CIVIL ACTION No. 2:12-cv-02271-LP

COMMONWEALTH OF PENNSYLVANIA COUNTY OF MONTGOMERY	: : :	 SS.

AFFIDAVIT OF BRIAN O'DONNELL

I, Brian O'Donnell, an adult individual, being duly sworn, do hereby state as follows:

1. I am Senior Vice President of Operations for AAMCO Transmissions, Inc. ("Plaintiff" or "ATI").

2. I am familiar with the history of Defendant Gary Otto ("Defendant" or "Otto") as a franchisee of ATI. I am also aware that Defendant Otto uses his companies, Defendant SunWest Holdings, LLC ("SW Holdings") and SunWest Automotive, LLC ("SW Auto"), in connection with his ownership and operation of his franchise and its premises.

3. Since at least 1963, ATI has continually used the name "AAMCO" as its trade name, trademark and service mark in connection with the operation of a network of automotive repair centers.

4. It is the exclusive owner of its marks and maintains current registrations of the marks with the United States Patent and Trademark office.

5. ATI is engaged in interstate commerce in, inter alia, the business of franchising or licensing others to use the mark and name "AAMCO" in the operation of transmission and general automotive repair centers throughout the United States and Canada.

6. There are approximately 800 AAMCO locations licensed or franchised by ATI to operate automotive repair centers under the "AAMCO" trade name and trademark.

7. The "AAMCO" trade name and trademark have become universally associated with the repair of motor vehicle transmissions and the operation of transmission and general automotive repair centers.

8. As a result, ATI owns common-law trade name and trademark rights in the name "AAMCO" and other associated marks.

9. By virtue of the long use and promotion, and the resulting fine public reputation of the trade name "AAMCO", there exists a secondary meaning in the name "AAMCO".

10. Large sums of money have been spent in advertising and promoting the services sold under ATI's trade name and trademarks, and today ATI has a substantial business and a long established goodwill associated with the name and the above marks in connection with the services provided under its trade name and trademarks.

11. ATI has a vital interest in protecting its trade name and trademarks and the preservation and protection thereof are essential to the maintenance of ATI's quality transmission and general automotive repair centers and the goodwill and reputation associated therewith.

12. To supervise and control use of its trade name and trademarks, ATI has established standards and policies governing the quality of service to be provided to the public and has established procedures calling for the inspection of franchisees' centers to determine that the standards and policies are being followed.

13. On November 14, 2003, ATI and Defendant Otto entered into a franchise agreement, pursuant to which Otto was authorized to use, and has used, the name and mark "AAMCO" in connection with the operation of an automotive repair center located at 2801

Cortez Road – West, Bradenton, FL 34207 (the "Center"). A true and correct copy of this franchise agreement (the "Franchise Agreement") is attached at Exhibit "A.

14. The Center was first established under the AAMCO trademark on September 7, 1993, and has been advertised in the Bradenton area as AAMCO ever since.

15. Defendant Otto, however, did not own or commence operation of the Center until more than ten (10) years after the Center was established, on December 18, 2003.

16. In November of 2003, before he was allowed to commence operation of the Center as AAMCO, Otto attended ATI's intensive owner training class in Pennsylvania lasting several weeks where he was taught the intricacies of ATI's successful proprietary system of doing business.

17. Otto has been provided ATI's proprietary operating and technical manuals, national customer lists and proprietary software.

18. Otto has also received periodic in-field training, operational support, bulletins, newsletters, alerts and access to ATI's national technical hot line.

19. In consideration for the services provided by AAMCO under the Franchise Agreement, Otto was required to pay ATI a continuing franchise fee of seven percent (7%) of the gross business transacted at the Center as well as certain other fees and charges.

20. Each week, Otto was required to submit to ATI an accurate weekly business report documenting the Center's gross revenues and the amounts collected.

21. Otto's weekly business reports were used to calculate the weekly franchise fee due to ATI.

22. On August 18, 2010, ATI conducted an unannounced field audit at the Center and discovered that the Defendants were engaged in widespread and systematic underreporting of gross revenues to ATI and under payment of franchise fees to ATI.

23. Defendant Otto uses his companies, SW Holdings and SW Auto, in connection with his ownership and operation of the Center premises.

24. Defendant SW Holdings holds title to the real property upon which the Center is located, and Defendant SW Auto operates the Center and leases the property from SW Holdings.

25. On November 10, 2010, ATI and Defendants entered into a Settlement Agreement wherein it was agreed that the Franchise Agreement would not be immediately terminated and that Otto could continue as ATI's franchisee. In consideration, Otto:

a. executed a Promissory Note in favor of ATI in the amount of $90,000, which note provides that its balance shall become immediately due and payable to ATI upon termination of the Franchise Agreement; and

b. tendered to ATI a Lease Rider executed by Defendant SW Holdings, who holds title to the Center premises and leases it to Defendant SW Auto, who is the leasee of the Center premises, wherein ATI was conditionally assigned SW Auto's right, title and interest as leasee of the Center premises; the assignment being exercisable by ATI upon the termination of the Franchise Agreement.

A true and correct copy of the Settlement Agreement, Promissory Note and Lease Rider (collectively referred to as the "Settlement Package") are attached hereto at Ex. "B".

26. On April 11, 2012, Otto met with ATI at ATI's office in Pennsylvania to discuss the results of ATI's January 2012 audit of the Center.

27. At the meeting, Defendant Otto acknowledged that his Center continued to underreport revenue but could not explain how the continued underreporting could have occurred without his knowledge or approval.

28. Defendants have failed to deal honestly and fairly with ATI.

29. Section 18.1(c) of the Franchise Agreement permits ATI to immediately terminate the Franchise Agreement if the termination is based in whole or in part on Otto's failure to deal honestly and fairly with ATI.

30. In a letter dated April 17, 2012, ATI terminated Otto's Franchise Agreement in accordance with Section 18.1(c) and informed Otto that ATI was exercising its right under the

conditional assignment of the Lease Rider to assume the lease for the Center premises. In the letter, ATI further requested Otto to comply with his post termination obligations under the Franchise Agreement and Settlement Package, which include:

a. Assignment of the Center's lease to ATI;

b. Payment of the remaining balance of the Promissory Note;

c. Payment of the amounts due and owing under the Franchise Agreement, including the amounts owed by Otto associated with the underreported gross receipts uncovered by the January 2012 audit;

d. Discontinuance of business as an AAMCO franchisee;

e. Surrender of all signs, training materials, manuals, videos, stationery, letterhead, forms and other printed material containing AAMCO marks;

f. Discontinuance of all advertising as an authorized AAMCO dealer; and

g. Compliance with the covenant not-to-compete.

A true and correct copy of ATI's letter dated April 17, 2012 is attached hereto at Ex. "C".

31. Despite the termination of his franchise and any further authority to continue in business under and the use of the AAMCO name, Defendant Otto has refused to take the actions required by the Franchise Agreement to remove the AAMCO name and trademark from the Center and its signs and cease all use of ATI's systems and AAMCO merchandising materials there and, instead, using ATI's AAMCO advertised telephone number for the Center, has continued to operate the Center under the name and style "AAMCO Transmissions", to hold himself out to be an authorized AAMCO franchisee, and to use the AAMCO trade name and trademark, without any license or right whatsoever.

32. Defendant Otto has failed to transfer the AAMCO advertised telephone number to ATI and refused to return any of ATI's trademarked or proprietary items in his possession.

33. Despite the termination of the Franchise Agreement and exercise by ATI of its conditional right, Defendants have failed and refused to assign SW Auto's right, title and interest as leasee of the Center premises to ATI.

34. ATI is the exclusive owner of the AAMCO marks and Otto's use of these marks is permitted only through the Franchise Agreement.

35. Notwithstanding ATI's demand that Otto comply with his post termination obligations, Defendants continue to operate at the Center location under the AAMCO mark using ATI's AAMCO advertised telephone number for the Center.

36. The Center has operated under the AAMCO trademark since September of 2003.

37. Customers have come to know the former Center as "AAMCO" and Defendants continue to hold themselves out to the community as AAMCO.

38. Defendants have been given access to ATI's proprietary systems and have been provided its confidential information and material, trade secrets, and other unique methods, procedures and techniques developed by ATI.

39. Defendants have retained, and are using ATI's proprietary software, manuals and other materials containing ATI's marks, proprietary knowledge and trade secrets.

40. Defendants are using their knowledge of ATI, its unique system of doing business and other confidential information in Otto's competing business.

41. Defendants continue to operate an automotive repair business using the AAMCO trademark, materials, advertised telephone number, trade secrets and proprietary information.

42. At the same time, Defendant Otto is no longer burdened with paying franchise fees.

43. ATI has several other AAMCO Transmission Centers in the Bradenton area.

44. If Defendants are permitted to flagrantly violate the non-compete covenant and conditional assignment without penalty or recourse, ATI will not be able to police its own mark and protect the System for its franchisees.

45. Defendant's continued operation of a competing business from the location at issue undeniably creates an unfair competitive advantage to Defendants.

46. ATI's efforts to set up a new AAMCO Transmission Center in Bradenton will be unfairly stymied as potential franchisees will not likely be willing to pay franchise fees to operate essentially the same business as the Defendants, who are already operating from an AAMCO location with AAMCO advertising.

47. Defendants continue to operate under the AAMCO trademark using the AAMCO advertised telephone number for the former Center (i.e., 941-753-6050).

48. As such, Defendants are misleading customers into believing that Defendant Otto's competing business is a bona fide AAMCO Transmission Center when it is not.

49. The public interest will be served by issuing the injunctive relief requested in that customers who bring their vehicles to the Defendant Otto's business will no longer be misled into believing that they are receiving repair services and warranties from a bona fide AAMCO Transmission Center, which they are not.

Brian O'Donnell

Sworn to and subscribed before me
this 3rd day of May, 2012.

Alicia O'Connell
Notary Public

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Alicia O'Connell, Notary Public
Horsham Twp., Montgomery County
My Commission Expires Oct. 4, 2012
Member, Pennsylvania Association of Notaries